

**REMARKS**

Claims 1-3, 5-6, 8, 21-22, and 25-32 remain pending in the present Application. All of the pending claims stand rejected under one or more of Sections 102 and 103, as specifically discussed below. Applicant submits that the following remarks address all of the issues raised in the Office Action of 26 June 2008.

**Claim Rejections under 35 U.S.C. 102 - Parker**

Claims 1, 5, and 25 again stand rejected under 35 U.S.C. 102(b), as being anticipated by U.S. Patent No. 5,323,652 (hereinafter, "Parker"). Applicant again respectfully traverses the rejection of all of these claims for at least the reasons of record.

As a preliminary matter, Applicant repeats and incorporates by reference herein those arguments detailed on pages 2 through 9 of the Response filed February 28, 2008. The outstanding Office Action incorrectly states that those arguments are moot in light of the "new rejections" in the Office Action. The Section 102 rejection of claims 1, 5, and 25, however, is merely repeated from the previous Office Action, and not a "new ground" of rejection. Section 707.07(f) of the MPEP places a burden upon the Examiner to, before repeating a rejection, to first answer the meritorious arguments traversing that rejection. In the present case, however, this burden has not been met. Applicant explained in detail how Parker fails to anticipate claims 1, 5, and 25, and none of these arguments have been answered. Applicant therefore repeats these arguments for the record, and details some of the specific failings of this rejection further below.

Independent claim 1: This claim recites a symbol-bearing receptacle for a fluid, including:

- (a) a container for the fluid; and
- (b) a transparent symbol disposed on the container, the symbol having a water reactivity that differs from water reactivity of the container,
- (c) *wherein the difference in water reactivities* renders the symbol visually distinct from the container when the container holds the fluid and when a temperature of the container is reduced to a condensation point.

As pointed out in prior responses, in order to anticipate claim 1, Parker must teach each of the above claim elements (a)–(c), and “*the identical invention must be shown in as complete detail as contained in the ... claim.*” MPEP 2131 citing *Verdegaal Bros. V. Union Oil Co. of California*, 814 F.2d 628, 2 USPQ2d 1051 (Fed. Cir. 1987) and *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 9 USPQ2d 1913 (Fed. Cir. 1989), emphasis added. Applicant has shown clearly detailed on the record how Parker does not meet this requirement, and therefore cannot and does not anticipate claim 1.

Left still unanswered on the record is the fact that Parker fails to teach (or even suggest) claim element (b), a transparent symbol having a water reactivity that differs from water reactivity of a container that it is disposed upon. Parker entirely fails to disclose (or even suggest) a symbol having a different water reactivity from that of a container. The rejection even appears to concede this point.

For example, instead of pointing to any teaching (or suggestion) from the reference to support the assertion, the rejection merely states that Parker’s propane tank indicator is “deemed to have a water reactivity that differs from water reactivity of the container, *since they are made of different material*, e.g., thermochromic material versus non-thermochromic material”. (Office Action p. 2, final paragraph). This quote is *verbatim* from the prior Office Action. The rejection appears to have entirely ignored the argument that different materials do not necessarily have different water reactivities, and has thus improperly taken Office Notice without submitting any evidence in support thereof. For example, it is well-known that “thermochromic” relates to color changeability with heat, and not to reaction with water. On the other hand, “water reactivity” relates to reaction with water. Thermochromicity and water reactivity are not interchangeable. Therefore, the argument in the rejection is without merit. Furthermore, it is important to note that Parker is silent as to water reactivity. Thus, Parker does not meet the required criteria for establishing a Section 102 rejection. Parker does not and cannot teach or show the identical invention of claim 1.

Applicant respectfully requests that the Examiner fully consider the above arguments and respond in full before repeating the rejection. Should the Examiner repeat this rejection again, Applicants point out that the Examiner is required to submit

objective evidence on the record to support the assertion that different materials automatically have different water reactivities. Without such evidence on the record, the assertion, and thus the rejection as well, must be withdrawn.

Because Parker is completely silent regarding water reactivity, the Examiner is required to: (1) in the case of Official Notice, provide documentary evidence on the record that clearly teaches (or suggests) that every different material has a different respective water reactivity (MPEP §2144.03(C)); and (2) in the case of inherency, “provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art.” MPEP §2112 quoting *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990), emphasis in original.

Neither of these requirements can be met in the present case, because it is known in the art that at least some different materials can have the same water reactivity (e.g., hydrophilic or hydrophobic). There is no evidence on the record in this case that materials having different thermochromic properties (e.g., as in Parker) will necessarily exhibit different water reactivities. Differing thermochromic properties merely involve different color reactions to a range of temperatures. Essentially, the rejection presumes that two materials having no other difference between them but their colors will as a necessity also have different water reactivities. This conclusion is unreasonable, and for at least this reason alone, the rejection cannot be maintained.

The rejection though, is still further deficient on its face for failing to cite any teaching or suggestion from Parker that indicates that the difference in water reactivities renders the symbol visually distinct from the container when the temperature of the container is reduced to a condensation point. Even if the unsupported assertion from the rejection, namely, that different materials automatically have different water reactivities, were true (which Applicant does not concede), the rejection still fails to show that Parker somehow teaches that the difference in water reactivities has any effect on Parker's system. Parker clearly teaches nothing of the sort.

Parker expressly teaches that it is only *temperature*, and not any water reactivity, that renders the thermochromic layer 18 visible. (See col. 3, lines 53-60). There is

simply no teaching or suggestion in Parker of differing water reactivities, let alone such differing water reactivities rendering a symbol visually distinct. In contrast, independent claim 1 (as well as 25) unambiguously recites that the difference in water reactivity is at least one factor to render the symbol visually distinct from the container.

The idea that Parker relies upon water reactivity, in any way, is an unsupported conclusory construction that cannot be found in (to support a finding of anticipation), or presumed from (to support a conclusion of obviousness), Parker. Parker employs only *thermochromic* materials that change color with *temperature*. The reference does not discuss, or even suggest, differing water reactivities rendering a symbol visually distinct. Therefore, the anticipation rejection is further deficient on its face, and must be withdrawn for at least these reasons.

Independent claim 25: The rejection of independent claim 25 is equally deficient, and for at least the same reasons. This claim also recites a symbol having a water reactivity that differs from a water reactivity of a container that it is disposed upon. As noted above, Parker simply does not teach or suggest differing water reactivities.

Furthermore, like claim 1, claim 25 relies upon the difference in container/symbol water reactivities to render the symbol visually distinct from the container, when container temperature is reduced to a condensation point. Parker nowhere discusses water reactivities rendering a symbol visually distinct.

Again, Parker is concerned only with temperature – and not water reactivity – as the means for changing color of a *thermochromic* layer. A thermochromic layer, by definition, is one that reacts to temperature. Without an express, *additional* teaching regarding water reactivity, the additional assumption of a thermochroic layer reacting to a difference in water reactivity cannot be assumed. No such teaching exists in Parker, and the rejection of claim 25 based only on Parker must be withdrawn for at least these reasons.

Additionally, and contrary to the Examiner's assertion, Parker does not teach an open fluid receptacle, as clearly featured in claim 25). The rejection asserts, from Parker's FIG. 1 and col. 3, lines 5-10, that such a feature can be found. Respectfully, however, this assertion represents a clear misreading of the reference. The wavy line at

the top of FIG. 1 merely indicates that what is shown in the drawing is simply a partial view of a propane tank, and not the entire tank itself. The text from col. 3, lines 5-10 also fails to add any support the conclusory assertion that container is open.

One skilled in the art though, would easily understand that, since the container shown in FIG. 1 is a propane tank, the tank would never be an open fluid receptacle. Propane is a gas that is compressible to a liquid. In its liquid form, propane would diffuse out of an open container, rendering the container unusable for its intended purpose. Furthermore, propane is a flammable gas, which would be highly undesirable to store in an open container, as it could create an explosion hazard within a storage facility or building. If liquid propane could even be stored in an open container, it would quickly revert to its gaseous form, unless stored at a temperature so low as to render condensation on a water-reactive symbol impossible. Therefore, Parker could only be considered to suggest an open propane container for temperatures that could not read upon the condensation point features of claim 25 either. Accordingly, the rejection of claim 25 based solely on Parker is further deficient on its face for at least these reasons as well.

The above arguments are of record, and have still been left unanswered. Applicant has demonstrated how the anticipation rejection based on Parker is clearly deficient on its face in several respects, and why the rejection must be withdrawn.

#### **Claim Rejections under 35 U.S.C. 102 - Arora**

Claims 1-3, and 5-6 stand rejected under 35 U.S.C. 102(b), as being anticipated by U.S. Patent No. 7,048,971 (hereinafter, "Arora"). Applicant respectfully traverses this new rejection as well because a *prima facie* case of anticipation has not been established with respect to this reference either. Arora fails to teach (or suggest) that a difference in water reactivities between the symbol and the container renders the symbol visually distinct, and when the container holds a fluid.

Arora discloses a two-part symbol 10, with one part being hydrophilic, and the other being hydrophobic. (See FIGS. 1-2). The two-part symbol 10 can be attached to a substrate, which can be an LCD (see col. 12, lines 39-57), but Arora never discusses a

specific relationship between water reactivities of the symbol and the LCD. In fact, Arora clearly teaches that it is only the difference between water reactivities of the separate parts of the symbol itself that renders the symbol visible, and not a difference with the container. An LCD screen will contain fluid typically, but the presence of the fluid in the LCD will have no effect on the visibility of Arora's symbol.

In contrast, independent claim 1 of the present Application, as last amended, features that the difference in water reactivities between the symbol and the container is what renders the symbol visually distinct, and when the container holds the fluid. Arora does not teach or suggest these features. The visibility of Arora's symbol is self-contained by its two-part structure. The water reactivity of the LCD will have no effect on its visibility, nor will the presence of the liquid crystal that may be contained within the LCD device. It is important to note that Arora never even actually shows a container in a single drawing. Accordingly, Arora cannot teach (or suggest) that its symbol's visibility is dependent on either of the water reactivity relationship with the container, or the fluid being present in the container, both of which are clearly featured in independent claim 1 of the present Application.

Claims 2-3 and 5-6 all depend from independent claim 1, and therefore contain all of the features of the base claim, plus additional features. Accordingly, the rejection of these dependent claims is respectfully traversed for at least the reasons discussed above in traversing the rejection of independent claim 1 based solely upon Arora.

### **Claim Rejections under 35 U.S.C. 103**

Claims 8, 21-22, and 25-32 stand rejected under 35 U.S.C. 103(a), as being unpatentable over Arora in view of U.S. Patent No. 4,032,687 (hereinafter, "Hornsbly") and Parker. Applicant respectfully traverses this obviousness rejection for at least the reasons of record, those discussed above, and as follows.

Claims 8 and 21-22: With respect to claims 8 and 21-22, Applicants traverse the rejection for at least the reasons discussed above. Each of these claims depends directly or indirectly from claim 1, and therefore the base rejection that relies on Arora is still

deficient with respect to these claims. The mere citation to Hornsby and Parker – without indicating what portions of these references are allegedly relevant to the present claims – fails to resolve the clear deficiencies in the base reference. Applicant further traverses the rejection as follows.

With respect to claim 8, none of the three references teaches or suggests a symbol embedded in the surface of the container. The American Heritage Dictionary of the English Language (Fourth Ed. 2000), defines the term "embed" as meaning:

(1) To fix firmly in a surrounding mass: embed a post in concrete; fossils embedded in shale. (2) To enclose snugly or firmly. (3) To cause to be an integral part of a surrounding whole.

None of Arora, Hornsby, or Parker show any symbol embedded in a container surface. As unambiguously shown in FIGS. 1-2 of Arora, FIGS. 1-5 of Hornsby, and FIGS. 1 and 5-8 of Parker, not a single indicator/symbol is shown to be embedded in any surface of any container. Arora and Hornsby both show nothing other than stick-on labels or films that will always be over – and not in – the surface of the respective substrate (Arora, not shown or numbered) or cup 12 (Hornsby). Parker additionally discloses magnetic indicators, but also only on top of – never in – the surface of the tank 12. The rejection of claim 8 therefore, is further deficient on its face for at least these reasons, and must be withdrawn.

With respect to claim 21, none of the three references show a confined passageway disposed within a surface of the container, as featured in the claim. Similar to the deficiencies in the rejection of claim 8, not one of the three references teaches or suggests any features within the surface of a container. As discussed above, Arora fails to even show a single container. Hornsby shows a cup 12, but never shows or describes anything embedded or disposed within the surface of the cup 12. Parker shows a tank 12, but equally fails to show or describe anything – embedded or disposed – within the surface of the tank 12. Applicant is at a loss to understand the Examiner's reliance on any of these references with respect to these claims. Given that the Office Action fails to even assert what features of the references allegedly read upon these features of claim 21

(and 8), Applicant must assume that the rejection was an error on the Examiner's part. The rejection must be formally withdrawn for at least these reasons.

With respect to claim 22, the rejection is even further deficient. Claim 22 depends from claim 21, and therefore is patentable for at least the same reasons that apply to claim 21 (as well as claim 1). The rejection is further deficient for failing to even assert where any one of the references teaches or suggests that the alleged passageway in the surface of the container additionally is configured for holding a coolant. Again, not one of the references shows or describes anything similar, and the rejection makes no effort to indicate where such features could exist in the cited art. The rejection of claim 22 therefore, must also be withdrawn.

Claims 25-32: With respect to independent claim 25, the rejection is deficient for at least the reasons discussed above with respect to the rejection of claim 1 based only upon Arora. Claim 25 similarly features a relationship between the water reactivities of the symbol and the container (unlike Arora), and neither Hornsby nor Parker teach or suggest anything about water reactivities. Accordingly neither Hornsby nor Parker could modify Arora to make up for this significant deficiency in the base references.

Claim 25 additionally features that the container is open, and therefore neither of Hornsby and Parker *could* be combined with Arora to reach the present invention with respect to claim 25. As discussed above, Parker does not show an open container. The reference has been clearly misread in this regard. Hornsby shows an open cup 12, but the rejection fails to even assert that Hornsby's cup 12 *could* somehow be adapted to the LCD cited from Arora, let alone that there is any teaching or suggestion in either reference that one of ordinary skill would be motivated to do so.

An LCD cannot operate as an open container, without ruining the "container" for its intended use. Moreover, the rejection fails to provide any line of technical reasoning for how a paper cup (Hornsby) could be structurally adapted to modify the LCD device cited in Arora. Hornsby's applique 10 – similar to Parker – is nothing but a temperature indicator. It has nothing to do with water reactivity, and its application to the cited LCD from Arora would do nothing more than indicate a temperature threshold for the LCD.



The combination would not, for example, indicate the presence of the liquid crystal fluid in the LCD.

It should also be noted that claim 25 further features that the symbol is disposed on a base facing a substrate, from which extends a wall that forms the container. Hornsby and Parker are therefore both excluded from a rejection of claim 25 because both references affix the temperature indicator to only a wall of the respective container, and not a base. Neither reference could be modified to move the respective symbol to the base, because either reference would therefore be ruined for its intended purpose. Both references are meant to have the temperature seen from the wall side of the container.

The rejection is therefore further deficient on its face according to Section 2143.01 of the MPEP. Section 2143.01 requires that, absent objective evidence on the record of some well-known principle in the art, the references themselves must provide a teaching or suggestion to make the proposed combination. In the present case, however, no evidence of any well-known art principle has been submitted to the record, nor has any teaching or suggestion from the references themselves been cited in support of the proposed combination of all three references. Without such evidence on the record, the proposed combination is itself conclusory only, and thus demonstrates a clear case of impermissible hindsight. Accordingly, the Section 103 rejection is further deficient on its face, and must be withdrawn for these reasons as well.

Moreover, even could some motivation have been place in evidence to support the proposed combination (which Applicant does not concede), the rejection would still have to be withdrawn on rebuttal, since no combination of the three references could achieve the unchallenged advantages of the present claims. With respect to claim 25, for example, none of the references, alone or in combination, could indicate whether an open container still contained fluid. Parker and Hornsby could not show anything more than a temperature of the container, whether or not the container contained a fluid. Arora fails to show how any parameter of the container could be indicated. Arora's purpose is merely to show its symbol briefly in response to outer stimuli. The contents of the LCD, or any other container, are irrelevant to Arora's two-part symbol. In the only example cited, Arora's symbol would appear (or not) regardless of whether there was any fluid in

the LCD device. Accordingly, the novel, useful, and unchallenged advantages of the present claims would still overcome the *prima facie* Section 103 rejection of record, even could it have been properly established.

With respect to claims 26-32, these claims each depend directly or indirectly from claim 25, and are therefore allowable for at least the same reasons. With respect to claims 30-32 specifically, Applicant further traverses as follows.

With respect to claim 30, none of the references, whether taken alone or in combination, teaches or suggests a plurality of base extensions elevating the substrate from the base, nor that one or more of the base extensions form the symbol. Applicant is frankly at a loss to understand what portions of these references the rejection could have meant to refer to in its summary rejection. Not one of the references shows any extension from a base, let alone an extension forming the symbol. As discussed above, the indicators from Hornsby and Parker are both attached to a wall of a container, and not the base. Arora simply remains silent about containers as a whole. The rejection of claim 30 therefore, is entirely without merit, and must be withdrawn.

The rejection of claims 31 and 32 are thus also entirely without merit for similar reasons. As discussed above with respect to claims 21 and 22 respectively, none of the three references, whether taken alone or in combination, teach or suggest anything related to a confined passageway disposed within one or both of the base and the wall (claim 31) or that the passageway is configured for holding a coolant (claim 32). Nothing remotely similar to either of these features appear in any of the references, and the rejection of these claims in particular is entirely without merit. The rejection of claims 31-32 must also be withdrawn.

**CONCLUSION**

Applicant submits that the above remarks address all issues raised in the Office Action of 26 June 2008. Applicant accordingly solicits a Notice of Allowance for all pending claims.

This Response is timely filed within the three-month shortened statutory period for reply. Hence, no fees are believed due. However, should any fee be deemed necessary in connection with this Response, the Commissioner is authorized to please charge any such fees to Deposit Account No. 12-0600.


Should any issues remain outstanding, the Examiner is again invited to contact the undersigned attorney.

Respectfully submitted,

LATHROP & GAGE L.C.

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